vss

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO.1341 OF 1980

The Cotton Corporation of
India Limited
having its Regd. Office at
Air India Building, 12th floor,
Nariman Point, Bombay-21 ... Plaintiff

V/s.

The Bombay Dyeing & Manufacturing
Company Limited having its
regd. office at Neville House,
Graham Road, Ballard Estate
Bombay-38 ... Defendants

Mr.R.C. Shah with Mr.Y.M. Mahajan i/b Divekar & Co. for Plaintiff
Mr.U.J. Makhija with Mr.P.N. Modi, Mr.Uday Bhanu Singh, Mr.Manek N. Mulla and N.P. Lashkari i/b Mulla & Mulla & CBC for Defendants

CORAM: **SMT.NISHITA MHATRE, J.**

JUDGEMENT RESERVED ON: **APRIL 25, 2006**
JUDGEMENT PRONOUNCED ON: **JULY 03, 2006**

JUDGMENT:

. The Plaintiff has claimed in this Suit an amount of Rs.94,77,722.60 as damages for breach of a contract between it and the Defendants.

2. The Plaintiff is a Company wholly owned by the Government of India. It is a canalising agent for import of cotton. The Plaintiff imports cotton in bulk on the basis of a bulk import licence. Various consumer mills are then able to avail of this imported cotton on issuance of subsidiary licences to the mills under the arrangement between the plaintiff and the consumer

mills. According to the Plaintiff, the consumer mills are required to place orders for purchase of cotton with the plaintiff. The cotton is imported and allocated to the consumer mills as sanctioned by the Textile Commissioner. The cotton is then required to be lifted by the consumer mills on the basis of a subsidiary import licence. A contract is executed between the parties. The contract is normally in a particular standard format, requiring the consumer mills to accept the cotton as made available by the plaintiff.

3. In the present Suit, it is the case of the plaintiff that it imported cotton in bulk. After receipt of the cotton on the basis of the bulk import licence, the plaintiff issued a circular dated 5.4.1977, at Exhibit P1, enquiring from various mills as to whether they required imported cotton, the shipments whereof were to be received some time in June-July 1977. Three varieties of cotton were mentioned in the circular. The Mills were directed to approach the plaintiff by 20.4.1977 for registering their demand. The Defendants by its letter dated 10.5.1977 which is at Exhibit P2 placed an order for 2500 bales of California Arizona cotton. Immediately thereafter an agreement dated 12.5.1977 which is at Exhibit P3 was sent to the defendants requiring them to accept the same by signing it and returning the duplicate copy of the agreement within seven days. Under Clause 33 of this agreement, it was stated that if the copy was not returned within

the stipulated time, it would be deemed that the mill had accepted the agreement. The defendants by their letter dated 20.5.1977 informed the plaintiff that the 7-day period stipulated in clause 33 of the agreement would begin as of that date. Thereafter on 21.5.1977, a letter was issued to the defendants that they had been allotted 2500 bales of cotton of the California Arizona variety. Under clause 9, the Defendants were required to inform the Plaintiff as well as the Textile Commissioner's Office their "acceptance or otherwise" of the allotment. On 26.5.1977, the defendants informed the plaintiff that they would intimate their acceptance or otherwise of the allotted bales of cotton by 4.6.1977. Undisputedly there was no such communication from the Defendants to the Plaintiff. On 2.7.1977, the plaintiff informed the defendants that instead of 2500 bales of cotton, 2052 bales had been imported and allocated to them. On 12.7.1977, a communication was sent to the Plaintiff by the defendants in response to the letter of 2.7.1977, intimating the Defendants that they should "treat as closed" the subject regarding 2500 bales of California Arizona cotton. Again on 9.8.1977, the Defendants communicated to the plaintiff that there was no question of taking delivery of the 2500 bales of cotton, the "contract" having lapsed since they had not given a bank guarantee as required. Correspondence thereafter continued between the plaintiff and the defendants, the plaintiff calling upon the defendants to take delivery of the bales of cotton and the defendants

refusing to do so. The Plaintiff has, therefore, filed the present Suit, restricting its claim against the Defendants for damages amounting to Rs.94,77,722.60.

4. On the basis of the pleadings of the parties, the following issues were framed on 27.1.2000:

> 1. Whether the plaintiffs prove that there was concluded contract for sale of 2500 bales of CALIFORNIA ARIZONA COTTON between the plaintiffs and the Defendants?
>
> 2. Whether the plaintiffs prove that the Defendants committed breach of the contract by wrongfully cancelling the Contract and by not taking delivery of the contracted cotton?
>
> 3. Whether the plaintiffs prove that the plaintiffs suffered loss of Rs.94,45,861.32 Ps. or any other sum on account of breach of the contract on the part of the Defendants and that the plaintiffs are entitled to for the said sum with interest as claimed in the suit?
>
> 4. What reliefs?

Additional issues were framed on 25.9.2003 thus:

> 1. Whether the claim in the suit is barred by the laws of limitation?
>
> 2. Whether the Plaintiff acted as an agent of the Defendant and if so whether the suit as framed is maintainable?
>
> 3. Whether the alleged contract is contrary to the provisions of Article 299 of the Constitution of India?
>
> 4. Whether the Plaintiff had validly and legitimately waived the requirement of the Bank Guarantee as alleged in paragraph 9 of the Plaint?
>
> 5. Whether the Defendant was bound and liable to accept the alleged offer of delivery of 2052 bales of cotton as alleged in paragraphs 10 and 12 of the plaint?

6. Whether the property in the goods shipped had passed to the Defendant as alleged in para 14 of the Plaint?

7. Whether the Plaintiff is entitled to claim or recover from the Defendant clearing charges or demurrage or interest or carrying charges as alleged in the particulars of claim being Exhibit J to the Plaint?

8. Whether the Plaintiff waived whatever rights they may have had if any in respect of the suit transaction as contended in para 15A (VII) of the Written Statement?

5. The Plaintiff has led evidence in support of its claim by examining one V.Munnikrishnan who was the Deputy Manager of the Plaintiff at the relevant time. One Nandlal Kanji Somaiya, who was a partner of M/s.Nensi Tejpal & Sons, the clearing and forwarding agents responsible for clearing 1000 bales of cotton received by the plaintiff was also examined by the Plaintiff. The defendants have not chosen to lead any evidence in rebuttal.

6. The crucial question which arises in the present suit is Issue No.1 i.e., whether there was a concluded contract between the parties. If this issue is held in affirmative, then the other issues would have to be answered. However, if this issue is answered in the negative, it would not be necessary to consider any of the other issues. In order to determine this issue, it would be necessary to consider the pleadings in the plaint and to evaluate the oral and documentary evidence on record.

7. The witness Munnikrishnan has deposed to the procedure followed while importing cotton for canalising the same for use by various mills. This witness has proved various documents. The witness has also proved the document at Exhibit P7 as well as the endorsement on this document which according to him has been written by him and initialled by him on 11.7.1977.

8. Undisputedly, the plaintiff issued the circular dated 5.4.1977 informing the mills that three varieties of cotton were being imported and were available for allocation to the mills. In case any of the mills were interested in importing the cotton they were required to send their applications for subsidiary import licences and a bank guarantee within 10 days after confirmation of the booking of their order. There is no dispute that the defendants had by their letter dated 10.5.1977 responded to the circular by requesting the plaintiff to book 2500 bales of California Arizona cotton @ 5050 per candy C.I.F. There is also no dispute that the Plaintiff had issued the agreement being contract No.G/621 dated 12.5.1977 to the defendants which is at Exhibit P3. Under clause 3 of this agreement, it was stipulated that the contract or agreement entered into between the plaintiff and the foreign suppliers i.e., the import contract, would form an integral part of the agreement. The agreement between the plaintiff and the defendants was subject to the terms and conditions of the import contract. It was the responsibility of the

defendants to take delivery of the goods after making full payment against documents or the delivery order to the Corporation i.e., the Plaintiff. Clause 28 stipulates that the Mill would not be entitled to cancel or revoke the agreement once made for any reason whatsoever and it would be liable to pay damages to the Cotton Corporation of India Limited in the event of cancellation. Under clause 29, the cotton once shipped could not be rejected. Clause 33 requires the defendants to return a duplicate copy of the agreement, signed, within seven days of the receipt of the agreement. It is further stipulated in this clause that in the event it is not so returned, the agreement would be deemed to have been accepted by the mill. Clause 34 makes the agreement subject to the mill producing the necessary bank guarantee within 10 days of the agreement failing which the agreement was liable to be cancelled. Admittedly, the duplicate copy of the agreement has not been returned by the mill either within the stipulated period of 7 days or at any time thereafter. Although by their letter dated 28.5.1977, the defendants had informed the plaintiff that the 7-day period mentioned in clause 33 would begin from 28.5.1977, admittedly the Defendants have not signed the agreement and returned the copy of the same to the plaintiff. By a letter dated 21.5.1977 addressed by the Textile Commissioner to the Defendants, they were given an option under clause 9 either to accept or reject the quota allotted within 15 days of the issuance of the quota letter. Therefore,

the defendants were expected to inform their acceptance or otherwise of the contract by 4.6.1977.

9. It has been argued on behalf of the plaintiff that although there may be no written contract, the correspondence which ensued between the parties and the conduct of the parties would leave no room for doubt to infer that there was a concluded contract between the parties which the defendants had sought to repudiate. To test this argument it would be necessary to examine the circumstances relied on by the Plaintiff to submit that there is a concluded contract. One such pointer relied on by the Plaintiff is the letter of 20.5.1977 of the defendants which is at Exhibit P4. This letter extends the period within which the signed document was to be returned to 4.6.1977. However, it would be necessary to ascertain whether the mere failure on the part of the defendants to return the duplicate copy of the agreement duly signed would amount to the contract being concluded. If one is to accept the submission made on behalf of the plaintiff that there was a concluded contract which came into effect on either 7 days after 12.5.1977 or at least on 4.6.1977, the quota letter issued by the Textile Commissioner’s office on 21.5.1977 which is at Exhibit P5 would be meaningless. This letter which is the allotment letter, categorically stipulates, under clause 9, that acceptance or otherwise of the quota should be intimated to the Corporation i.e., the plaintiff and to the Textile Commissioner’s

office within 15 days of the issuance of the quota letter. By the letter of 26.5.1977, the defendants had informed the plaintiff that they would indicate their acceptance or otherwise of the quota by 4.6.1977. There is no material on record to show that the plaintiff had been intimated about the acceptance or otherwise of the quota by the defendants.

10. As aforesaid, the letter dated 2.7.1977 at Exhibit P7 bears the following endorsement:

> "Shri Vakil saw me today & requested for cancellation of the contract. I told him that in view of the previous correspondence and as the goods have already been shipped, it is not possible to cancels the contract. However, he said he would write to us."

11. According to the learned Counsel appearing for the Plaintiff, this endorsement suggests that the defendants had accepted the agreement and were aware that there was a concluded contract between the parties, which had been concluded on 4.6.1977. This submission cannot be accepted. Assuming for the moment that the agreement of 12.5.1977 was deemed to have been accepted in view of clause 33 of that agreement, the quota letter must also be considered. Both these documents at Exhibit P3 and P5 must be read together in order to ascertain whether there is a concluded contract between the parties. The documents cannot be read in isolation. The quota letter at Exhibit P5 does not contain any clause similar to Clause 33 of the agreement at Exhibit

P3. There is no deeming provision in the quota letter. On the other hand, the mill is called upon to inform the Textile Commissioner's office as well as the Plaintiff as to whether it requires cotton. Reading the two documents together it is obvious that if a signed copy of the agreement was not returned to the Plaintiff, it could not lead to the inference that the mill required the cotton. However, the contract between the parties would stand concluded only if the mill had accepted the quota which was offered by the Textile Commissioner and informed the plaintiff accordingly. Undisputedly, the Defendants have not indicated their acceptance but have instead by their letter of 26th May 1977 stated that by 4.6.1977 they would inform the Plaintiff their acceptance or otherwise. Therefore, in my view it cannot be presumed that the Defendants had accepted the offer made in the quota letter. Therefore, in my view, there is no concluded contract at all.

12. Furthermore, in the pleadings, the plaintiff has stated that the contract between the parties was concluded since the defendants had not surrendered the sanctioned quota of 2500 bales of cotton. According to the plaintiff, the contract between the parties came into existence on and from the morning of 28.5.1977 as pleaded in para 7 of the plaint. Thereafter, the plaintiff has pleaded that in any event it came into existence after 4.6.1977 by which time the defendants were required to intimate the acceptance of the quota

allotted to the Textile Commissioner as well as to the plaintiff. The plaintiff has then pleaded that the Textile Commissioner not being an agent of the plaintiff had no authority to alter the contents of clause 33 of the contract and therefore, the contract must be deemed to have been executed and had come into existence on 28.5.1977. In the evidence the witness of the Plaintiff has stated 4.6.1977 to be the date on which according to him the contract was concluded. It is clear in my opinion that the plaintiff is prevaricating about the date on which the contract according to it was concluded.

13. The agreement of 12.5.1977 stipulates under clause 3 that the import contract would form an integral part of the agreement. Admittedly that import contract has not been furnished to the defendants alongwith Exhibit P3. Therefore, in my opinion, it cannot be said that there was a concluded contract between the parties on the mere failure of the defendants to return a duplicate copy of the agreement within 7 days of the receipt of the agreement. The plaintiff did not bother to forward a copy of the import contract to the defendants even before 28.5.1977. Therefore, in my opinion, the contract cannot be deemed to have been concluded. The defendants had at no point of time any opportunity to consider the import contract which formed an integral part of the agreement dated 12.5.1977.

14. The subsequent correspondence which has been exchanged between the parties is with respect to the bank guarantee which was to be furnished under clause 34 of the agreement. It is the case of the defendants that since the bank guarantee was not furnished to the Plaintiff by the defendants as required under clause 34 of the agreement, there is no contract. Clause 34 expressly provides that the agreement is subject to the condition of the mill producing the necessary bank guarantee within 10 days from the date of the agreement failing which the agreement was liable to be cancelled. It has been contended by the learned Counsel for the plaintiff that insistence on a bank guarantee would be at the option of the plaintiff. The Plaintiff could always waive the condition of furnishing a bank guarantee. The agreement could not be said to be cancelled or revoked if the bank guarantee was not furnished, since the plaintiff had decided to waive this requirement. This submission cannot be accepted. Clause 34 of the agreement overrides all other clauses in it. Obviously, therefore, it would be open for the mill to consider the agreement as cancelled if it did not provide the bank guarantee within 10 days as stipulated although the agreement was deemed to have been accepted under clause 33. Admittedly, in this case, no bank guarantee was furnished by the defendants within the stipulated time. Therefore, although by not returning the duplicate copy of the agreement duly signed within seven days of the receipt of the

agreement, it would be deemed to have been accepted by the mill, the failure to produce the bank guarantee would amount to cancellation of the agreement. The learned Counsel for the plaintiff sought to contend that the plaintiff has not insisted upon the bank guarantee being given since there were several contracts executed between the plaintiff and the defendants for importing cotton, earlier. The track record of the defendants was good and therefore, the plaintiff had waived the stipulation regarding the bank guarantee.

15. Reliance is placed on the judgment of the Kerala High Court in the case of *M/s.Bismi Abdullah & sons, Merchants & Commission Agents v/s.The Regional Manager, F.C.I. Trivandrum & Anr.*, **AIR 1987 KERALA 56**. The Kerala High Court on interpretation of the clause in the tender documents regarding the security deposit has held that the Food Corporation of India which had issued the tenders had the option to waive the security deposit since the clause mentioned that the tenders were liable to be rejected simultaneously if not accompanied by the security deposit. In my view, clause 34 in the agreement overrides all other clauses and therefore, the judgment of the Kerala High Court would have no application. Furthermore, the plaintiff had at no point of time informed the Defendants about the waiver of the bank guarantee.

16. The submission of the learned Counsel for the Plaintiff that there was a deemed contract under clause 33 of Exhibit P3 which had come into existence in any event by 4.6.1977, cannot be accepted. According to the learned Counsel, the endorsement dated 11.7.1977 on the letter at Exhibit P7 clearly mentions that the Manager of the Defendants had requested the plaintiff to "cancel" the contract. Obviously, therefore, it would mean the defendants were aware that there was a concluded contract, according to the learned Counsel. The letter of 12.7.1977 at Exhibit P8 issued by the defendants states, after referring to the 2500 bales of California Arizona cotton, that the subject should be treated as closed. According to the learned Counsel, the first letter which actually repudiates the contract was issued by the defendants only on 9.8.1977. This letter mentions that the defendants had informed the plaintiff that the contract had lapsed in view of their failure to furnish the bank guarantee. The learned Counsel also submits that there was no need to communicate a waiver of the bank guarantee and, therefore, it must be concluded that there is a binding contract between the parties. I am unable to accept the submissions of the learned Counsel. Non-communication by the defendants regarding acceptance of the contract or the defendants' failure to return the copy of the agreement duly signed cannot in my opinion, lead one to infer that there was a concluded contract. Under section 7 of the contract Act, 1872, acceptance of a

proposal must be absolute and unqualified. If one considers the Textile Commissioner's quota letter, the contract would come into existence only if the defendants communicated to the plaintiff as well as the Textile Commissioner their acceptance or otherwise of the quota allotted. The agreement at Exhibit P3 which was in the usual format did not amount to a concluded contract between the parties. None of the letters issued by the defendants to the Plaintiff have in any manner indicated that the defendants had accepted the offer made by the plaintiff of importing the bales of cotton on behalf of the Defendants.

17. In my opinion, the plaintiff has not been able to prove that there is a concluded contract between itself and the defendants and therefore, it is not entitled to damages. There is no need to answer the other issues raised as they would be of no consequence as there was no concluded contract between the parties.

18. Suit dismissed.